

# **JUDICIAL ADMINISTRATION**

## **IMPROVING THE WORK OF THE COURTS**

### **Judicial Conference of the United States**

The federal judiciary as a whole is governed for administrative purposes by the Judicial Conference of the United States, a national body constituted pursuant to 28 U.S.C. § 331. Consisting of representatives of all the federal courts, the Judicial Conference roughly resembles a legislature for the judicial branch, or perhaps a board of directors.

The tabulation following indicates Second Circuit representation on the various committees of the Conference. The names of the committees provide a kind of summary of the issues dealt with by the Judicial Conference. These are highly important bodies because the full Conference meets only twice each year, primarily to act upon committee reports. Most business is transacted on the “consent calendar,” adopting committee proposals. The committees are generally staffed by the Administrative Office of the United States Courts, the Washington agency responsible for judicial branch administration and support at the national level. In addition, the Federal Judicial Center conducts research for many committees.

As Chief Judge of the Second Circuit, Chief Judge John M. Walker, Jr. is the statutory Second Circuit representative on the Judicial Conference of the United States. He will continue in this role during his tenure as the Chief Judge of the Circuit. The current Second Circuit District Court representative is Chief Judge Frederick J. Scullin, Jr., of the Northern District of New York, whose term expires on September 30, 2004.

The Judicial Conference met in Washington, D.C., on March 18, and September 23, 2003. At the March 18th meeting, the Judicial Conference, at the recommendation of the Committee on Federal-State Jurisdiction, unanimously adopted a resolution expressing the Conference’s continued opposition to legislation pending in the 108th Congress that, if passed, will expand federal jurisdiction over class action litigation by permitting, through the use of minimal diversity citizenship, the initial filing in or removal to federal court of almost all such actions now brought in state court. Since 1999, the Conference has expressed its concern that such legislation would be inconsistent with principles of federalism and would add substantially to the workload of the federal courts. In the March 18th resolution, the Conference, while recognizing that the use of minimal diversity of citizenship may be appropriate to the maintenance of significant multi-state class action litigation in the federal courts, noted that Congress, in the event it passed such legislation, should be encouraged to include sufficient limitations and

threshold requirements so that federal courts were not unduly burdened and states' jurisdiction over in-state class actions remained undisturbed. The Conference further resolved to continue to explore additional approaches to the consolidation and coordination of overlapping or duplicative class actions that did not unduly intrude on state courts or burden federal courts.

Also at the March 14th meeting, the Committee on Judicial Resources, as part of the biennial Article III judgeship survey, recommended and the Judicial Conference agreed to transmit to Congress a request for additional Article III judgeships, including two circuit judgeships for the Second Circuit Court of Appeals, three permanent and one temporary district court judgeships for the Eastern District of New York and one temporary judgeship for the Western District of New York. On recommendation of the Committee on the Administration of the Magistrate Judges System, the Conference approved the redesignation of the part-time Southern District Magistrate Judge from Newburgh, New York to Middletown, New York. The Conference also approved the Magistrate Judges Committee's recommendation that the number, locations and arrangements of the Magistrate Judges in the Western District of New York remain unchanged in the district.

On March 27, 2003, the House of Representatives approved a floor amendment (the "Feeney Amendment") to H.R. 1104, 108th Congress, the then-pending, "Child Abduction Prevention Act," which would have, among other things, restricted district courts' authority to depart downward from the sentencing guidelines to grounds specifically identified by the United States Sentencing Commission. It also would have required, in appeals of downward departures, *de novo* review by the courts of appeals of sentencing judges' application of the guidelines to the facts. The House substituted H.R. 1104 for an earlier-passed Senate bill dealing with child pornography, and a conference was scheduled forthwith. By mail ballot concluded on April 3, 2003, the Executive Committee of the Conference, adopted the recommendations of the Committee on Criminal Law, that the Conference oppose legislation eliminating the courts' authority to depart downward in appropriate situations unless the grounds relied upon are specifically identified by the Sentencing Commission as permissible for departure; oppose legislation that directly amended the sentencing guidelines and suggest that Congress should instruct the Sentencing Commission to study changes to particular guidelines and to report to Congress if it determines not to make the recommended changes; oppose legislation that would alter the standard of review in 18 U.S.C. §3742(e) from "due deference" regarding a sentencing judge's applications of the guidelines to the facts of a case to a "*de novo*" standard of review; and urge Congress not to pursue legislation in this area until after the Judicial Conference, the Sentencing Commission and the Senate have had an opportunity to consider

more carefully the facts about downward departures and the implications of making such a significant change to the sentencing guideline system. On April 30, 2003, a somewhat narrower version of the bill subsequently passed by Congress was signed into law as the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 or “ PROTECT Act” (Public Law No. 108-21). At the September 23, 2003 meeting, the Conference voted to support repeal of certain provisions of the PROTECT Act that did not relate to child kidnapping or sex abuse, including the provisions previously acted upon on behalf of the Conference by the Executive Committee as well as certain provisions of the Act on which the Conference had not previously taken positions, including, among others:

The requirement that directs the Sentencing Commission to make available to the House and Senate Judiciary Committees all underlying documents and records it receives from the courts without established standards on how these sensitive and confidential documents will be handled and protected from inappropriate disclosure; the requirement directing that the Sentencing Commission release data files containing judge-specific information to the Attorney General; the requirement directing the Department of Justice to submit judge-specific sentencing guideline departure information to the House and Senate Judiciary Committees and the requirement that the Sentencing Commission promulgate guidelines and policy statements to limit departures.

Also at the September 23rd session, the Conference endorsed the recommended changes to the miscellaneous fee schedule by the Committee on Court Administration and Case Management (“CACM”), following a comprehensive review undertaken by CACM of the miscellaneous fees set by the Judicial Conference for the courts of appeals, the district courts, the United States Court of Claims, the bankruptcy courts and the Judicial Panel on Multi-District Litigation. These changes included adopting inflationary increases to most miscellaneous, increasing the fee in the courts of appeals for docketing a case on appeal or review, or docketing any other proceeding, from \$100 to \$250, establishing a new, optional fee to the court of appeals miscellaneous fee schedule of \$200 per remote location for the use, at the request of counsel, of videoconferencing equipment in connection with an oral argument to defray the cost of transmission lines and maintaining the videoconferencing equipment used by the courts, and that the fee for filing a lift stay motion in bankruptcy courts be increased from one-half the filing fee prescribed in 28 U.S.C. §1914(a) to the full filing fee which is currently \$150.

At its September 23rd meeting, the Conference approved the recommendation of the Committee on Defenders Services to create a new section

in the guidelines for the administration of the Criminal Justice Act and related statutes encouraging courts to use case budgeting techniques in complex, non-capital panel attorney representations that appear likely to become or have become extraordinary in terms of cost. These new provisions parallel those already pertaining to managing the CJA representation costs in capital cases.

JUDICIAL COUNCIL OF THE SECOND CIRCUIT



**Top row, left to right:**

Circuit Judge Chester J. Straub  
Chief Judge Robert N. Chatigny, District of Connecticut  
Circuit Judge Guido Calabresi  
Circuit Judge Dennis Jacobs  
Circuit Judge Rosemary S. Pooler  
Chief Judge William Sessions III, District of Vermont  
Circuit Judge Robert D. Sack

**Bottom row, left to right:**

Chief Judge Michael B. Mukasey, Southern District of New York  
Circuit Judge José A. Cabranes  
Chief Circuit Judge John M. Walker, Jr.  
Chief Judge Edward R. Korman, Eastern District of New York  
Chief Judge Richard J. Arcara, Western District of New York

**Absent:**

Chief Judge Frederick J. Scullin, Jr., Northern District of New York

**SECOND CIRCUIT JUDGES SERVING ON U.S. JUDICIAL  
CONFERENCE COMMITTEES AND SPECIAL COURTS  
FEBRUARY 2004**

John M. Walker, Jr.	Court of Appeals	The Executive Committee
Jed S. Rakoff	S.D.N.Y.	Committee on the Administration of the Bankruptcy System
Victor Marrero	S.D.N.Y.	Committee on the Budget
Denis R. Hurley	E.D.N.Y.	Committee on Codes of Conduct
John G. Koeltl	S.D.N.Y.	Committee on Court Administration and Case Management
Norman A. Mordue	N.D.N.Y.	Committee on Criminal Law
John Gleeson	E.D.N.Y.	Committee on Defender Services
Loretta A. Preska	S.D.N.Y.	Committee on Federal-State Jurisdiction
Robert D. Sack	Court of Appeals	Committee on Financial Disclosure
Rosemary S. Pooler	Court of Appeals	Committee on Information Technology
Janet Bond Arterton	Connecticut	Committee on International Judicial Relations

## Judicial Administration

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Robert A. Katzmann	Court of Appeals	Committee on the Judicial Branch
William K. Sessions, III	Vermont	Committee on the Judicial Branch
Dennis Jacobs, Chair	Court of Appeals	Committee on Judicial Resources
Nina Gershon	E.D.N.Y.	Committee on the Administration of the Magistrate Judges System
J. Garvan Murtha	Vermont	Committee on Rules of Practice and Procedure
Mark R. Kravitz	Connecticut	Committee on Rules of Practice and Procedure
Laura Taylor Swain	S.D.N.Y.	Advisory Committee on Bankruptcy Rules
Shira A. Scheindlin	S.D.N.Y.	Advisory Committee on Civil Rules
David G. Trager	E.D.N.Y.	Advisory Committee on Criminal Rules
David G. Trager <i>Ex-Officio</i>	E.D.N.Y.	Advisory Committee on Evidence Rules
Barrington D. Parker, Jr.	Court of Appeals	Committee on Security and Facilities
William K. Sessions, III	Vermont	U.S. Sentencing Commission



**COMMITTEES OF THE SECOND JUDICIAL CIRCUIT  
OF THE UNITED STATES**

Jed S. Rakoff, Chair	S.D.N.Y.	Bankruptcy Committee
Rosemary S. Pooler, Chair	Court of Appeals	Information Systems and Technology Committee
José A. Cabranes, Chair	Court of Appeals	Library Committee
Barrington D. Parker, Jr., Chair	Court of Appeals	Space & Facilities Committee
Carol Amon, Chair	E.D.N.Y.	Committee on Judges' Obligation under 28 U.S.C. § 455
Robert D. Sack, Chair	Court of Appeals	History & Commemorative Events Committee
John M. Walker, Jr., Chair	Court of Appeals	Public Affairs Committee
Alfred V. Covello, Chair	District of Connecticut	Committee on Local Holding Procedure for Filing Motions
Robert N. Chatigny Chair	District of Connecticut	Connecticut Federal/State Judicial Council
William K. Sessions, III Chair	District of Vermont	Vermont Federal/State Judicial Council
George B. Daniels, Chair	S.D.N.Y.	New York Federal/State Judicial Council

**JUDICIAL CONFERENCE (SECOND CIRCUIT) AND JUDICIAL COUNCIL**

Circuit judicial conferences are periodic circuit-wide meetings convened pursuant to 28 U.S.C. §333. A modification to this statute, which formerly mandated an annual conference, permits the Judicial Conference to be held in alternate years. A 1996 modification of §333 makes attendance optional; formerly, active circuit and district judges were required to attend unless excused.

The 2003 Judicial Conference was a bench-bar conference. It was held on June 5th through 8th at The Sagamore on Lake George in Bolton Landing, New York. The Hon. John M. Walker, Jr., Chief Judge, presided over the conference and the Hon. Denise Cote, United States District Judge for the Southern District of New York was the Conference Chair. Prior to the judges' Executive Session on the first day of the conference, Chief Judge Walker met with the members of the Second Circuit Judicial Council. At the Executive Session, William Burchill, Jr., Associate Director and General Counsel of the Administrative Office of the United States Courts, appearing for AO Director, Leonidas Ralph Mecham, reported to the judges on AO initiatives concerning the federal judiciary. The Honorable Fern Smith, the Director of the Federal Judicial Center, also spoke to the judges about various education programs available to them. Following the Executive Session, members of the Federal Judges Association met.

At the Friday dinner program, the new district, bankruptcy and magistrate judges who had taken the bench since the 2002 Judicial Conference were introduced: Circuit Judge Reena Raggi, Western District Magistrate Judge Marian W. Payson and Court of International Trade Judge Timothy Stanceau. United States District Judge Barbara S. Jones of the Southern District of New York served as Toastmaster for the evening.

Friday morning June 6th, the Conference opened with Chief Judge Walker's Report on the State of the Second Circuit. The Chief Judge's speech focused on the continuing crisis of judicial vacancies among the federal courts, including the courts of the Second Circuit; the need to address the problems of aging and overcrowded courthouses throughout the Second Circuit; the caseload increase in the Court of Appeals due to a tremendous influx of immigration appeals over the past year and national bi-partisan efforts to redress the inequities of judicial pay. Following Chief Judge Walker's Report, two plenary sessions were held. Circuit Judge Robert A. Katzmann moderated a discussion entitled, *Federalism: Where Are We Heading?*, between Professor Marci A. Hamilton of the Benjamin N. Cardozo School of Law of Yeshiva University and former Solicitor General Seth P. Waxman, now with Wilmer, Cutler & Pickering in Washington, D.C. The second Friday morning plenary session was moderated by Senior Circuit Judge Ralph K. Winter. Judge Winter led a discussion based on the criminal, civil

and administrative investigations into the activities of a fictional corporation which bore a striking resemblance to the activities of a certain well known Houston, Texas corporation. Entitled, *Enron On My Mind*, the panel included James B. Comey, United States Attorney for the Southern District of New York, Stephen Fraidin of Kirkland & Ellis, Patricia M. Hynes of Milberg Weiss Bershad Hynes & Lerach, LLP, Lawrence B. Pedowitz of Wachtell Lipton Rosen & Katz, Linda C. Thomsen, Deputy Director of the Enforcement Division of the Securities and Exchange Commission in Washington, D.C., Richard Walker, General Counsel, Corporate and Investment Bank, Deutsche Bank AG and Theodore V. Wells of Paul Weiss Rifkind Wharton & Garrison. Eighth Circuit Court of Appeals Judge and Chair of the United States Sentencing Commission Diana E. Murphy provided closing remarks on federal sentencing guidelines issues in white collar criminal cases.

The second day of the Conference opened with a report on the 2002-2003 United States Supreme Court term by Circuit Justice Ruth Bader Ginsburg. Following her report, Justice Ginsburg and her colleague, Associate Justice Stephen G. Breyer participated in a dialogue with Southern District Judge Loretta A. Preska and Eastern District Judge John Gleeson. Both Justices joined Chief Judge Walker, Second Circuit Judge Dennis Jacobs, Chair of the Second Circuit Committee on the American Inns of Court Professionalism Award and Judge Randy J. Holland, President of the American Inns of Court, in presenting the second annual Second Circuit American Inns of Court Professionalism Award to Gerald Walpin, Esq. of KMZ Rosenman. Circuit Judge Dennis Jacobs, who chaired the selection committee, introduced Mr. Walpin and explained to the audience the basis for his selection by the Committee.

After the presentation of the Second Circuit American Inns of Court Professionalism Award to Mr. Walpin, Circuit Judge José Cabranes moderated a panel discussion, *The Role of Courts in Time of War*, with Professors Ruth Wedgwood of Johns Hopkins University, William C. Banks of Syracuse University College of Law, Burt Neuborne of New York University School of Law and Scott L. Silliman of Duke Law School.

The 2003 Judicial Conference concluded with the presentation of a rock opera, *There's Something Afoot*, written, produced and directed by Steven Edwards, Esq. of Hogan & Hartson and former President of the Federal Bar Council and starring The Federal Bar Council Players: Dennis Cariello, Jason Cooper, Carey Dunne, Jennifer Edlind, Suzanne Griffin, Carrie Kei Heim, Deirdre Kane, Fran Obeid, John Redmon, Yasuhiro Saito, Gary Sandelin, Spencer Schneider, Irene Vavulitsky, Frank Velie and Jim Zucker. After the performance

concluded, Mr. Edwards and his band of musician-attorneys provided music for dancing.

Principal items of discussion at the Judicial Council meetings during the year included judicial misconduct complaints, the states of the dockets of the courts of the Circuit, and Circuit-wide space, security and automation issues. The Council especially was concerned about the continuing difficulties being encountered in the Eastern District courthouse construction projects in Brooklyn, New York. At its June 5th meeting, the Council received a report from Eastern District Chief Judge Edward R. Korman outlining the latest problems, including the apparent lack of monies necessary to finish the project and the rumor that the general contractor, J.A. Jones, was in danger of filing for bankruptcy. The Council directed Circuit Judge Barrington D. Parker, Jr., Chair of the Second Circuit Committee on Space and Security, to contact GSA Administrator Stephen Perry regarding the Brooklyn courthouse project in an effort to resolve these and other issues.

Judge Parker along with Chief Judge Korman and Eastern District Judge Raymond Dearie held a series of meetings throughout the year with GSA Administrator Perry, GSA Commissioner of the Public Building Service Joseph Moravec and Deputy Commissioner Paul Chistolini to resolve the problems plaguing the Brooklyn courthouse project. As a result of these meetings, GSA replaced local GSA staff on the project and assigned Deputy Commissioner Chistolini to supervise the project. In November 2003, J.A. Jones, the general contractor, filed for Chapter 11 protection in the United States Bankruptcy Court for the Western District of North Carolina, forcing the surety Firemen's Fund Insurance Corporation ("FFIC") to take over the project and bring in a new general contractor. As 2003 drew to a close, discussions between GSA and FFIC were ongoing and it appeared that Bovis Lend Lease would be the new contractor on the Brooklyn courthouse construction project. It is clear, however, that the project's completion will be delayed until sometime in 2005.

Also, in 2003, the Office of Public Affairs continued its outreach efforts which included coordinating the expanded *Courts Visits Program* for New York City high school students in conjunction with the Federal Bar Council, the annual April *Take Our Children to Work Day* program with the New York Women's Bar Association and its Foundation and organizing the national *Open Doors to Federal Courts* program in the Manhattan federal courts. The Public Affairs Office also oversaw student mentoring and moot court programs and provided courthouse tours for visiting foreign judges and court administrators.